UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT & GOVERNMENT REFORM
SUBCOMMITTEE ON INTERIOR

"Threats to Grazing from Federal Regulatory Overreach"

Statement of the
UTAH FARM BUREAU FEDERATION
&
THIRTEEN WESTERN STATE FARM BUREAUS

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Representative Lummis and Subcommittee Members:

It's an honor to be here today and share concerns about the threats to grazing from federal regulatory overreach and the burdens being placed on the grazing industry and livestock ranchers across the western landscape.

I am here today representing the Utah Farm Bureau Federation and its 27,000 member families. In addition, last week at the Western Farm Bureau Presidents and Administrators Conference I was asked to share my comments and concerns collectively on behalf of the Western Farm Bureaus representing nearly 400,000 member families.

Utah, like many western states, has vast acreages of rangelands. Those rangelands and the vast western ecosystem have developed over time to sustain grazing animals – both wildlife and livestock. Utah has 45 million acres classified as rangelands used for grazing with 33 million acres (73%) under federal management, and 4 million acres (9%) under state management leaving only 8 million acres (18%) privately owned.

Across the west, economically viable and sustainable ranching operations were developed, bringing together a combination of water rights, private lands and "common" lands, or those lands used by the community benefitting all.

The Taylor Grazing Act of 1934 established "grazing rights" for privately owned livestock grazing on federal grazing allotments. The Act stated the government shall "promote the highest use of the public lands *pending final disposal."* The courts have held that the rights granted by Congress to harvest forage on federal grazing allotments are "chiefly valuable for livestock grazing" and that permittees complying with the rules "shall not be denied" a grazing renewal. The Multiple Use – Sustained Yield Act of 1960 mandates the federal lands will be managed to benefit the American people.

The rights that Congress granted and that the courts have upheld establishing a level of certainty for ranchers is being eroded by systematic grazing cuts and regulatory overreach.

Privately held water rights, whether originating on private lands or public lands, were established through western water law based on "first-in-time, first-in-right" and beneficial use as determined under state law. Water is the sovereign right of the states and has been recognized and underscored through a series of Congressional actions, including Ditch Act of 1866, the Desert Land Act of 1877, the Taylor Grazing Act of 1934, the McCarran Amendment of 1952 and the Federal Land Policy Management Act of 1976. They provided a framework whereby ranchers could develop privately held water rights across the western public lands dedicated to livestock production. Ownership of water rights and private base property are required for livestock grazing on public lands under the Taylor Grazing Act.

It is important to note that under Utah State Law, livestock watering is one of the defined beneficial uses and only the owners of the livestock can hold a livestock water right – even on federal lands. This precludes the federal government from holding water rights. However, the United States Forest Service (FS) has aggressively pursued water from livestock ranchers holding private water rights on their federal grazing allotments through an internal policy requiring "joint water rights". Additionally, the FS has filed more than 16,000 diligence claims across Utah challenging rancher's water rights.

LIVESTOCK ECONOMICS - GRAZING IN UTAH

According to the *2015 Economic Report to the Governor* in 2012 there were 6,458 cattle ranching operations in Utah with nearly 800,000 cattle and calves generated some $361 million in direct farm gate sales. That same year, 1,622 sheep ranching operations with approximately 290,000 head of ewes topped $36 million in direct farm gate sales.

Agriculture and specifically livestock production is the economic foundation of many rural communities and counties. Federal land management policies, ongoing legal challenges to water rights, access and grazing are systematically reducing the number of family livestock ranching operations statewide and especially in agriculture dependent rural communities. According to the 2014 Annual Utah Agriculture Statistics Report:

- Top 5 Counties for beef production: (2013 vs 2012 beef cows) Loss

○ Box Elder	37,500	36,000	(-1,500)	$3,420,000
○ Duchesne	22,500	21,500	(-1,000)	2,280,000
○ Millard	22,500	21,500	(-1,000)	2,280,000

○ Uintah	20,000	19,200	(-800)	1,824,000
○ Utah	17,800	17,000	(-800)	1,824,000

- Top 5 Counties for sheep production (2013 vs 2012 sheep/lambs)

				Loss
○ Sanpete	66,000	64,000	(-2,000)	$600,000
○ Box Elder	44,500	43,500	(-1,000)	300,000
○ Summit	35,500	34,000	(-1,500)	450,500
○ Iron	26,000	25,000	(-1,000)	450,000
○ Utah	18,000	3,900	(-100)	30,000

UTAH – Total Beef Cattle Inventory (2013 vs 2012)

- 800,000 770,000 (-30,000)

UTAH – Total Sheep & Lambs Inventory (2013 vs 2012)

- 305,000 295,000 (-20,000)

ECONOMIC LOSS BASED ON AVERAGE SIZED RANCHING OPERATIONS

An average sized cattle ranch with 500 mother cows with a 95% calf crop marketing 550 – 650 pound feeder price (average 2014 steer-heifer price- $2.00/lb):

- Direct Farm Gate Sales = $570,000
- Economic Ripple Effect (2 multiplier) = $1.140 million

An average sized sheep ranch with 2,000 ewes and a 100% lamb crop marketing 150 pound lambs at today's prices ($1.00 / lb):

- Direct Farm Gate Sales = $300,000
- Economic Ripple Effect (2 multiplier) = $600,000

ECONOMIC LOSS / STATEWIDE:

30,000 less cattle = Based on current beef market prices there is a $70-80 million loss in direct sales and associated business losses.

20,000 less sheep and lambs = Based on current lamb market prices there is a $6-7 million loss in direct sales and associated business losses.

ANNUALLY OCCURRING LOSS

It's important to recognize the loss of more than $75 million in direct sheep and cattle sales losses and associated business impacts are not a "one-time" event. They continue as a lost opportunity cost until the Utah sheep and cattle herds are rebuilt.

REGULATORY CHALLENGES TO GRAZING INDUSTRY

"Increasing Command & Control"

In the public lands states of the American West, there has been a growing distrust of federal land management agencies, as they have imposed greater command and control over the natural resources of the region. The changing attitudes within the land management agencies - often driven by the politics of the day - creates uncertainty and economic challenges for farmers, ranchers, businesses, communities and the future of the western public lands states.

The pervasive culture and attitude of the leaders and employees of the FS and Bureau of Land Management (BLM) has become even more confrontational in recent years. They are seeking to exercise greater control over the public lands including restricting access, limiting grazing rights and seeking ownership of livestock water rights. These detrimental actions are seemingly without regard for the history, culture and economics as required by federal laws including the Federal Land Policy Management Act (FLPMA).

The agency actions adversely impacting the grazing industry may be as innocuous as a voluntary Animal Unit Months (AUMs) reduction agreed upon during an annual grazing review or as subversive as the introduction of a competing species like the bighorn sheep with the ultimate long term goal of cutting domestic sheep grazing in a specific geographic area. This is certainly not as dramatic and onerous as grazing cuts due to the failure of the federal government to meet the management obligations of the Wild Horse and Burro Act, but over time, just as effective.

I appreciate the Committee on Oversight and Government Reform, Subcommittee on Interior investigating whether or not the federal land management agencies have honored and followed their Congressional multiple use mandate as found in the Taylor Grazing Act and Multiple Use-Sustained Yield Act.

SYSTEMATIC DISMANTLING OF LIVESTOCK RANCHING

For decades there has been a slow, methodical and systematic attack on critical multiple use components and functions that underpin successful family livestock ranches on public lands. Access, bullying, adverse agency actions, challenges to livestock water rights, even activities as simple as building corrals and providing salt have become increasing difficult.

Utah by the Numbers

Historically, grazing AUMs in Utah hit a high point in the late 1940s at around 5.5 million administered by the BLM and FS. An AUM is the amount of forage required to feed one cow and calf or five sheep grazing on rangeland for 30 days. There were 3,467 ranching families grazing

sheep and cattle on Utah public lands in 1949, supporting their rural communities. At its peak, Utah rangelands supported more than 3 million sheep. Today there are only about 295,000 sheep and lambs – a 90 percent drop.

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The FS reports in 2012 approximately 840,000 active AUMs, of which 225,000 are in non-use status. BLM reports in 2012, around 1,188,000 active AUMs with 340,000 in suspended use (non-use) status. Of the more than 5.5 million AUMs originally managed by federal agencies, only 2,028,000 AUMs remain today. It is important to note there are 565,000 of those so-called "active" AUMs that are in non-use status, completely at the discretion of BLM and FS.

Utah livestock ranching families have lost a whopping 3,472,000 grazing AUMs total (cut and suspended use) for a shocking 74 percent cut based on FS and BLM actions.

The grazing industry has been heavily impacted by these draconian BLM and FS cuts. In 1949 there were 3,467 ranching families grazing livestock on federal lands. Of the 3,467 ranching families in 1949, only 1,451 ranching families remain today producing beef and lamb and harvesting the forage that renews each year on the public lands. That means more than 2,000 ranching families have given up or have been forced from Utah's vast rangelands. Last year alone, even with beef prices at historic highs, Utah ranchers cut 30,000 head of cattle from the Utah cattle herd. At today's beef prices, this means that rural communities have an economic loss exceeding $70 million – a loss every year until we rebuild the Utah cattle herd.

The outcome of the dramatic federal grazing cuts hits every American in the pocketbook through higher beef and lamb prices. As for the western landscape, reduced grazing has ushered in an era of expanding acreages of noxious weeds and unharvested grass and other forage leading to catastrophic wildfires.

Utah's agriculture industry is an important part of the overall state's economy with agriculture production and food processing creating more than $17 billion in economic activity (14.1% of Utah GDP) and creating more than 80,000 jobs. Animal agriculture is the foundation, accounting for nearly 70 percent of Utah agricultural receipts, making multiple use of the federal lands critical to not only to ranching families and rural communities, but to Utah's overall economic health.

GRAZING RIGHTS & RANCHER CERTAINTY UNDER ATTACK

Challenges to Congressional Mandates:

With the introduction of federal land management agencies, ranchers who had for generations judiciously grazed on the common lands since pioneer settlement were compelled to engage in a partnership with the federal government and its land management agencies. Family sheep and cattle ranching operations needed FS and BLM partners they could place their trust in and could work with. Balancing the needs of the resource along with the business needs of the rancher has always been the goal of the ranching community. Ranchers understand the obligation of protecting the natural resources in their care because their next grazing season and future success depends on it.

A critical component in this private-public partnership is the ranchers' need for certainty. Like any other business on the American landscape, ranchers need certainty to make business decisions, investments and to plan for the future. Congress recognized this critical reality and has provided statutory guidance for the agencies as it relates to their multiple use mandate.

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The Forest Reserve Act of 1891 provided authority to establish the Department of Interior's Bureau of Forest for the management and orderly harvest of the nation's timber. The Taylor Grazing Act of 1934 established necessary resource management while recognizing a grazing preference right giving the ranching community much needed certainty. The Multiple Use – Sustained Yield Act of 1960 further defined the management objective of the agency to: "meet and serve human needs." The Congress recognized and has provided a framework for the FS and BLM land managers to work with the western livestock grazing industry and ranching families to ensure they have a viable future.

Sadly, there is a growing level of conflict and confrontation between federal land managers and livestock grazing interests often the product of anti-grazing, radical environmental groups and activist courts which have become a part of doing business. Mostly, those with sheep and cattle grazing permits have been forced to vacate grazing rights or acquiesce to the power of the federal land managers and the courts. Cuts in grazing permits and the federal agencies abusing "non-use" or "suspended-use" classification for reducing livestock grazing AUMs has become far to commonplace in Utah and across the west.

The BLM methodically reduced livestock grazing across the public lands states by nearly 50-percent from a high of 16 million AUMs in 1954 to about 8 million AUMs in 2000. Similar numbers are not available for FS administer lands in the western states. However, using Utah State University research and current FS reports, the history of FS management for Utah's grazing history is instructive. In 1940 the FS administered some 2,700,000 AUMs. By 2012 the FS had reduced Utah grazing AUMs to 833,000 with 225,000 in non-use effectively cutting livestock grazing to 614,000 AUMs, or a 77 percent cut.

Nevada Federal Chief Judge Robert Jones in his ruling in *United States vs. Wayne Hage* (2012) cited the insidious and long term goal of both the FS and BLM. He made the following observation:

> *"Anyone of school age knows the history of the U.S. Forest Service in seeking reductions in AUMs (Animal Unit Months) or even the elimination of cattle grazing during the last four decades. Not so much for the BLM – they have learned that in the last two decades."*

Nevada Chief Judge Jones did not speculate. He proclaimed for the record these agencies have plotted the systematic dismantling of western livestock ranching. The massive cuts in Utah's historic livestock grazing AUMs graphically substantiates the Judge's finding. With 67 percent of Utah owned and controlled by the federal government, the economic viability of livestock ranching is tied directly to the federal agencies grazing management philosophies.

AGENCY METHODOLOGY

Three Forest Reset:

It came to the attention of Farm Bureau and county commissioners in affected Southern Utah counties in 2014 that the FS on three National Forests had illegally undertaken a clandestine collaboration with anti-grazing NGOs to “reset” the grazing provisions of their Resource

Management Planning (RMP) documents. Farm Bureau and the county commissioners were concerned that the review and potential reset for the grazing components of the RMP would ultimately compromise ranching and their economic contributions in the communities around the three national forests.

The Dixie, Fishlake and Manti-LaSal National Forest supervisors were notified by the counties that their lack of participation invalidated the process and called on the FS to discontinue the work until incorporating NEPA. The counties further claimed under law the right to be at the table reviewing and participating in any potential grazing actions. Citing 40 CFR 1501.2, the counties called on the FS to “*consult with state and local agencies and Indian Tribe at the earliest possible time.”*

Based on initial reports, the goal of the Three Forest Reset and its NGO collaborator was to greatly alter livestock grazing. The counties were concerned that the reset would greatly alter the environment, resource use and the relationship with the local people stating that there is no statutory exemption from 102(2)(c) of NEPA. And 40 CFR 1501.6(a)(2) makes clear the lead agency (FS) must use any environmental analysis and proposals of a county cooperating agency to the maximum extent possible. 40 CFR 1506.2(d) requires the lead agency (FS) to assure the NEPA statement will discuss any inconsistencies between the proposed action and any approved state or local plan and laws, and where inconsistencies exist, the NEPA statement must describe the extent to which the lead agency will reconcile with state or local law.

The counties called on the FS to restart the process and immediately grant cooperating agency status on the counties, and not provide “defacto” cooperating agency status on anti-grazing NGOs. Several Southern Utah county commissioners in January 2015 met with Tom Tidwell, Chief of the United States Forest Service, in Washington D.C. Shortly after the meeting, Chief Tidwell officially terminated the Three Forest Reset.

Collaboratives:

When Utah Farm Bureau was approached by the Beaver Ranger District for the Fishlake National Forest (FNF) to co-sponsor the Tushar Grazing Allotments Collaboration effort in 2007, we did so with some reservations. Ultimately, Utah Farm Bureau agreed to be part of this group in hopes of ensuring the fair and equitable treatment of Utah grazing permittees. On February 5, 2015, we officially withdrew from the collaborative in protest due to FS actions.

The Utah Farm Bureau has historically been and still is skeptical as to the motives and agendas associated with collaborative processes. They tend to diminish local input while elevating potential anti-grazing groups participation. The Tushar Collaborative was a direct product of an appeal to the 2006 Record of Decision by various anti-grazing environmental groups whose agenda was, and still is, to fully restrict or substantially limit livestock grazing on FS and BLM administered lands. These same anti-grazing, agenda driven environmentalists are frequently involved in lengthy and costly lawsuits to not only hinder agency actions, but to obstruct legitimate livestock grazing permittees and ranching families across the west.

The Utah Farm Bureau earlier this year was informed that the FS required the Sorensen family grazing on the 10 Mile Grazing Allotment would be subject to the collaborative action without any choice or substantive input. The collaboration recommended ending livestock grazing on

the 10 Mile, a critical component of the rancher's operation. This caused significant concern to rancher as well as Farm Bureau.

The FS entered into this adverse 2006 appeal settlement – "Resolution Agreement Regarding Appeal of Final EIS and ROD for the Reissuance of Term Grazing Permits on Eight Cattle Allotments" without any actual participation from both the affected specified livestock permittee, the local grazing industry representatives, Farm Bureau nor local county government.

This is extremely important because the FS grazing permit renewal, as addressed in its 2007 settlement, was and is being undertaken in order to comply with the 1995 Rescission Act which was the primary purpose of the 2006 "Reissuance of Term Grazing Permits on Eight Cattle Allotments Beaver Mountain, Tushar Range" Record of Decision (ROD) and Final Environmental Impact Statement; the same documents the environmentalists were appealing. Livestock grazing and permit renewal was the subject of the appeal resolution. No permittee was afforded the right to participate in the settlement or notified in any manner; nor was the Utah Farm Bureau made aware of this settlement. This settlement was born out of the FS's desire to avoid litigation, and to not have to correct flaws in its planning documents identified by the environmentalists in their appeal. The 2009 Tushar Grazing Allotments Collaboration Final Report on page 11 states as follows:

> *"Before a decision was made on the appeal and in order to avoid potential litigation, the Beaver Ranger District and appellants developed a Resolution Agreement in which appellants agreed to withdraw their appeal in exchange for working collaboratively in the development of the existing and desired conditions and management practices to be used in developing management plans for two of the eight Tushar Range allotments."*

Farm Bureau has registered concerns that a collaborative moves the process from a court determining a specific, narrow point of law to the court opening up the entire grazing record to potential anti-grazing interests and access to sensitive or confidential interactions to outside NGOs.

On June 30, 2015 the Utah Farm Bureau notified Intermountain Regional Forester Chris Iverson and Grazing Supervisor Terry Pedilla we will no longer recommend to Utah ranchers with grazing permits on Forest System lands to participate in FS collaboratives. After withdrawing from the Tushar Collaborative in February 2015, we have not received a response from the federal agency. Until we are assured the collaborative process is transparent, fair and honest, Utah Farm Bureau will continue to recommend ranchers not participate.

On June 25, 2015, Garfield County Commission Chairman Leland F. Pollock notified the Forest Service Intermountain Region and officially offered the following:

- Collaborative means: to cooperative, usually willingly, with an enemy nation, especially with an occupying one's land (see dictionary.com)

- Garfield County has objected to the FS illegal collaboration and coordination with non-governmental special interests for approximately 4 years.
- The collaboration is nothing more than a ruse to give legitimacy to arbitrary and capricious decisions that satisfy only selfish interest groups.

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- Garfield County officially asserts coordination authority under NFMA (see 16 USC 1604(a)) to the maximum extent allowed by law and calls on the FS to strictly comply with coordination, cooperation and consistency requirements offered to local government.
- Garfield County will advise ranching constituents against participating in Forest "collaboration" efforts and will demand the fullest participation in the process allowed by law.

Annual Operating Instructions:

Of immediate concern related to the Annual Operating Instructions (AOI) is the Fishlake National Forest, Beaver Ranger District (with what appears to be consent from the Intermountain Region Forester's Office) has repeatedly and willfully misused this annual review process. In this specific situation the FS improperly attempted to impose larger, structural changes in the permit that would exclude livestock on prime grazing allotments and to alter the grazing standards – both designed to permanently reduce livestock grazing. According to 36 CFR 214.4(a)(1) in part, "Issuance of annual operating instructions does not constitute a permit modification and is not an appealable decision."

The FS has imposed use standards to such low levels that the permittee would be and is constantly in non-compliance and therefore susceptible of regulatory action and AUM cuts. For example, FS Planning Documents specifically require grazing use standards of 40 – 60 percent utilization as a percent of the year's entire forage growth. The FS on the Fishlake imposed an immediate 30 percent use standard on forage that when triggered required permitted cattle to be removed from the allotment without due process. The FS used the draconian 30 percent utilization standard to issue "non-compliance" notices as a method of harassment. Issuance of violations and non-compliance are very real threats for permittee and could be used by the agency to terminate the grazing permit.

This specific individual rancher case targeting the Sorensen family was a direct result of the Tushar Grazing Allotments Collaborative and the 2007 appeal settlement with the anti-grazing organizations noting the Grand Canyon Trust was the primary signatory group.

It should be pointed out, misuse of the AOI provides the agencies and NGOs the opportunity and potentially the likelihood of abuse on a larger geographic scale to the detriment of livestock ranchers and rural communities across Utah and the west of permittees are not aware of their rigths.

Transparency, Fairness and High Cost of the Appeal Process:

The appeal review process is inherently unfair. Under 36 CFR 214.7 Levels of Review, if a district ranger's decision is appealed by a permittee, it goes up the chain to the forest

supervisor. If the forest supervisor's decision is eligible for review, its discretionary review is done by the regional forester. This appeal process seems to lack open and transparent review where all the players are FS employees. Recognizing the appeal is a discretionary review process, the case is reviewed by players who know each other and generally receive the same training.

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The final administrative level appeal can simply not take place at the agency's discretion or can be very time consuming and costly for the permittee. Most grazing permittees in Utah are small operators and generally part of a larger grazing association. Often, with ranchers owning 25, 50 or 100 head of mother cows, an appeal process that appears less than fair and objective and realizing the high cost successfully appealing, many if not most permittees acquiesce to the demands of the land management agency including cuts in FS and BLM AUMs. If the agency actions become too onerous, smaller ranching interests just walk away!

The Sorensen case in Southern Utah is troubling. Federal land managers worked with anti-grazing groups through Tushar Collaborative process using the AOI to revise livestock use standards on a grazing allotment substantially different from the FS own Planning Documents. The grazing manager in the AOI set the grazing utilization standard at a paltry 30 percent, making it virtually infeasible for them to operate as an economically viable ranching operation. To appeal the FS district ranger's overreach in the AOI, the permittee was compelled to bring together environmental experts and a legal team at a cost in excess of $100,000. The family operates a relatively small 200 head operation, but has the financial resources to fight the district ranger action and force an appeal. After nearly a year of legal jockeying, the family recently got a reversal in the district ranger's decision.

This process that opens itself to anti-grazing groups and potentially like-minded federal land managers to continue the systematic dismantling of livestock ranching in the western public lands states.

Viability Assessment:

The 1976 National Forest Management Act (NFMA) mandates a "viability assessment" on Forest System Lands. In 1982, the FS promulgated broad agency regulations that provide near limitless authority to provide habitat, and in some situations, at the expense of generations old ranching operations. The FS regulations state:

> *"to provide habitat on National Forests that will support viable populations of native and desired non-native vertebrate species well-distributed across National Forest lands."*

Later revisions added the requirement to the FS regulations:

> *"would extend to additional species in the plant and animal kingdoms."*

Bighorn Sheep:

In 2010, the FS prohibited 13,000 head of domestic sheep from grazing on their historic grazing allotments within the Payette National Forest in Idaho. The action drove one sheep ranch out of business and dramatically reduced the numbers of sheep in three more operations. The FS used an obscure reference in the NFMA to maintaining "minimum viable" populations of all

vertebrate species found there. Anti-grazing activists argued that allowing domestic sheep grazing violated the regulations. A multi-year legal battle followed including Congressional scrutiny. Ultimately, the court ordered domestic sheep grazing to be eliminated from the bighorn habitat.

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Following the bighorn reintroduced into historic habitat, the FS wrote the Idaho Wool Growers Association recognizing the bighorns may occasionally migrate outside of their designated range but would not be cause for action. The FS in a January 1997 letter assured the sheep ranchers there would be no adverse impact on their operations:

> *"These bighorns are considered "at risk" for potential disease transmission and death. The Idaho Department of Fish and Game, the Oregon Department of Fish and Wildlife and the Washington Department of Wildlife will assume the responsibility for bighorn losses without adversely impacting existing domestic sheep operators."*
> (See Exhibit 1)

The Payette decision is impacting other Forests across the west with Bighorn populations. The FS is currently engaged in assessing "high risk" allotments grazing domestic sheep, even though only 3 percent of federal sheep allotments overlap with occupied bighorn habitat. The impacts could be dramatic on not only ranching families, but red meat production, wool, jobs and rural economies.

On the Uinta National Forest, Wyoming and Utah ranchers have been in continuing consultation with FS Intermountain Region personnel and district grazing managers regarding bighorn habitat and the viability assessment. Like the Payette scenario, the domestic sheep ranching families were given assurances when bighorns were re-introduced that the FS decision to not allow re-stocking of three vacant sheep allotments would provide adequate habitat. The FS in a April 1998 letter assured Summit County Utah Commissioners and permittee Joe Broadbent that:

> *"no permits would be cancelled to accommodate the re-introduction, and that no permits would be in jeopardy of cancellation in the future."* (See Exhibit 2)

Sheep ranchers from both Wyoming and Utah grazing on the north slope of the Uinta Mountains are facing tremendous uncertainty. Ranchers have been hearing their grazing rights may be terminated as early as 2017 to accommodate expanded habitat for bighorns to meet the agency's viability assessment.

Of equal or greater concern is the nature with which the FS is implementing its bighorn strategy. According to Greg Sheehan, Director of the Utah Division of Wildlife Resources, the state agency wants and intends to honor the earlier commitment that re-introduction of bighorns would not adversely impact domestic sheep ranching. This position raises the question of the authority of the FS to implement a policy that is contrary to the position of the state. The state possesses the right as well as the authority to manage wildlife populations, including bighorns, and the habitat they occupy, not the FS.

Wild Horses and Burros:

Since Congress brought wild horses and burros under federal management with passage in 1971 of the Wild Horse and Burro Act, the BLM has failed at managing the animals. This failure in turn has placed a tremendous burden on livestock ranchers with grazing rights. The burgeoning populations have robbed ranchers of forage on grazing allotments allocated for livestock. Private rangelands and privately held water rights are being overrun by the aggressive and territorial wild horses.

More than 45,000 wild horses and burros have been gathered and are currently living out their lives in holding pens, costing American taxpayers $50 - $60 million each year. The Act calls for the Secretary to "*destroy excess animals in the most humane and cost effective manner possible."* The Act does not provide for the stockpiling and feeding of these animals for the rest of their lives. Nor does it allow growing populations to be in conflict with grazing rights, water rights or county management plans.

Appropriate Management Levels (AMLs) are estimated at about 29,000 across the west. However, there are estimated to be more than 40,000 wild horses on the western rangelands – mostly in Nevada, Utah and Colorado. Scientists predict wild horse numbers could soar past 150,000 by 2020 if something isn't done.

Of major concern to the Farm Bureau is the agency calling on ranchers to "voluntarily reduce livestock grazing as much as 50 percent" due to increasing wild horse populations. We are concerned with the lack of urgency of the BLM in managing their wild horse and burro populations. Iron County Commissioner Alma Adams, a rancher and former Iron County Farm Bureau President, in official correspondence to the BLM called for the agency to follow the Wild Horse and Burro Act. He received the following comment in response on November 7, 2013:

> *"In order to maintain healthy rangeland conditions, we are in a position in which we must consider adjustments to livestock use for the year's grazing season. Currently we have no means to adjust horse numbers back to appropriate management levels…"*

With a growing level of conflict and the inaction by the BLM to meet their management obligations and bring horse and burro numbers to AML, Farm Bureaus in Wyoming, Nevada and Utah have joined with livestock ranchers bringing legal action ultimately to require the agency to meet it statutory obligations.

Farm Bureau is concerned that the Department of Interior (DOI) and the BLM are not only ignoring the Wild Horse and Burro Act, they are in violation of Public Rangeland Improvement Act (PRIA), the Taylor Grazing Act as well as the Multiple Use – Sustained Yield Act. Rather than tackle this difficult challenge, the DOI and BLM have chosen to put the burden of wild horse management on the livestock producers with grazing rights on the public lands creating conflicts and potentially displacing generations old ranching operations to make room for the increasing numbers of wild horses. This is an alternative and strategy that is unacceptable to Farm Bureau, to public lands ranchers, county land use plans and based on current law is unacceptable to Congress.

Endangered Species Act:

Enacted in 1973, the Endangered Species Act (ESA) was originally envisioned by Congress to protect species believed to be on the brink of extinction. When the law was enacted, there were 109 species listed for protection. Today, there are nearly 1,600 with another 125 candidate

species. The failure of the ESA is widely known, with less than two percent of all listed species being removed from the list.

The ESA is arguably the most far-reaching and abused environmental law ever passed. The prohibitions against “takings” can restrict a wide range of human activities. It allows special

interest groups, including anti-grazing groups, to sue anyone or activity they view as in violation of the Act. It places the interests of species above the interests of people.

This litigation-driven model has provided tremendous challenges for ranchers grazing livestock on the public lands.

On the western landscape, the expanding reach of the ESA is of great concern. It is being applied to public lands, private lands and the region’s scarce water resources. Anti-grazing groups along with like-minded federal land managers use the ESA to drive decisions and change the use of the resources. Protected species and resource restrictions create considerable management problems as well as financial challenges family ranching operations.

For example, the Selman Ranch of Cache Valley Utah. The multi-generational family sheep ranching operation combines private land along with FS and BLM to maintain a viable business. During the summer of 2012, the Selman’s moved 2,500 ewes and lambs to western Wyoming for pasture. A pack of wolves targeted the Selman’s sheep ultimately killing 225 lambs (about 10% of the year’s lamb crop) worth nearly $40,000. The loss of weight gain in the remaining lambs due to marauding wolves cost the family another $11,000. With the wolves nightly attacks, the Selman family sought and received permission from Wyoming Game & Fish to kill the offending animal. As word reached the United States Fish and Wildlife Service the Selman family was warned, “Don’t do it again!” Or there would be consequences.

The economic costs are quantifiable. The emotional toll was staggering for the three-generations of Selmans who care deeply about their animals and their God-given stewardship.

The ESA has devastating impacts on much of society, but falls more unfairly on farmers and ranchers. Private property is where many of the plants and animals are found. Farmers and ranchers work to enhance the property, including federal lands, with habitat improvements and water development attracting animals, including endangered or threatened species. ESA restrictions are particularly harsh because the land is their primary asset.

As Congress considers the adverse impacts of the ESA, the agencies are mandated to expand their regulatory view based on “climate change” and its potential impact on species. With that comes the very real, and potentially expansive move from designating critical habitat to engulfing “potential habitat.” What might the federal agencies deem as appropriate management for what they consider, or are required through legal proceedings, is future potential habitat as climate changes and the adverse impacts on property rights?

“WATER – A TROUBLED HISTORY

Forest Service Water Clause:

The FS, as pertains to conditional use permits like grazing permits and ski areas, has established the following water policy:

"This permit does not confer any water rights on the holder. Water rights must be acquired by the holder under state law. After June 2004, any right to divert water from the permitted NFS land where the use of such water is on the same permitted NFS land shall be applied for and held in the name of the United States and the holder (hereinafter called the "joint water rights"). This provision shall not apply to water rights that are acquired by the permit holder from a source off of the permitted NFS land and transferred to a point of diversion or storage on the permitted NFS land. During the term of the permit and any reissuance thereafter, the permit holder shall be responsible for maintaining such joint water rights, and shall have the right to make any applications or other filings as may be necessary to maintain and protect such joint water rights. In the event of revocation of this permit, the United States shall succeed to the sole ownership of such joint water rights.

Livestock Water Rights:

The US Forest Service through the "Water Clause" redefined by the agency in 2004 has become more aggressive in recent years in its administration of federal lands as pertains to privately-held livestock water rights. The Intermountain Regional Forester issued guidance that proclaimed:

Intermountain Region Guidance issued August 15, 2008:

> *"It is the policy of the Intermountain Region that livestock water rights used on national forest grazing allotments should be held in the name of the United States to provide continued support for public land livestock grazing programs."*

Intermountain Region Guidance issued August 29, 2008:

> *"The United States may claim water rights for livestock use based on historic use of the water. Until a court issues a decree accepting these claims, it is not known whether or not these claims will be recognized as water rights."*
>
> *"The Intermountain Region will not invest in livestock water improvements, nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held solely by the livestock owner."*

In the spring of 2012, livestock grazing permittees in Tooele County, Utah meeting with FS regarding the annual grazing plan were confronted by FS agents seeking a "sub-basin claim" from the state of Utah. Where a sub-basin claim is granted by the Utah Division of Water Rights,

changes in use and diversion can be done without state approval. The permittees were "asked" to sign a "change of use" application which would have allowed the agency greater ease in determining what the use would be, including changing use from livestock water to wildlife, recreation or elsewhere.

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When permittees objected, they were told that not complying with the Forest Service request could adversely affect their "turn out" (the release of their cattle onto their Forest allotments).

In 2008, Utah Legislature passed the Livestock Water Rights Act to define the water rights of permittees on the federal lands based on the rancher's ability to put the state's water to beneficial use. The Legislature said: "

> *"the beneficial user of a livestock watering right is defined as the grazing permit holder for the allotment to which the livestock watering right is appurtenant."*

The Forest Service filed an ownership claim on all livestock water rights on Forest System lands in Utah claiming they are "the person who owns the grazing permit."

Using the "Water Clause" as leverage, the FS pressured the Utah Legislature to amend the Utah Livestock Water Rights Act to include "joint ownership" in livestock water rights. The agency argued it was necessary to assure continued water for livestock grazing of Forest lands. State Representative Mike Noel begrudgingly offered the amendment "as requested," providing for a "Certificate of Joint Ownership." This action, and creation of a certificate, did not convey an ownership right in the state's water to the FS because water rights are based on the ability to beneficially use the state's water as defined.

It is important to recognize Utah law provides greater assurance of water remaining on the livestock grazing allotment than any federal agency assurances, including internal policies like the Water Clause or the FS proposed Groundwater Resources Management Directive. Utah law provides:

> *"A livestock water right is appurtenant to the allotment on which the livestock is watered."*

In 2014 the Utah Legislature deleted reference to the "Certificate of Joint Ownership" based on legal concerns that the "Water Clause" ultimately is a government taking that violates a property owner's protection as established under the Fifth Amendment to the United States Constitution guaranteeing just compensation and due process.

Over-Filing on Historic Livestock Water Rights

Joyce Livestock Company:

In *Joyce Livestock Company vs. United States,* the Owyhee County based cattle operation had ownership dating back to 1898 including in-stream stock water rights. The United States over-filed on the Joyce water rights based on a priority date of June 24, 1934 – the date of passage of the Taylor Grazing Act. The United States could not show that Joyce or any of its predecessors were acting as it agents when they acquired or claimed to have acquired the

water rights. In 2007, after nearly a decade of legal actions and hundreds of thousands of dollars in legal costs, the Idaho Supreme Court denied the United States claim and defined the standard of beneficial use. The Idaho Supreme Court said:

"The District Court held that such conduct did not constitute application of the water to beneficial use under the constitutional method of appropriation, and denied the claimed rights. The Idaho

Supreme Court concurred holding that <u>because the United States did not actually apply the water to a beneficial use</u> the District Court did not err in denying its claimed water rights."

Wayne Hage:

In 1991 in *Hage vs United States*, the Forest Service and BLM over-filed on the livestock rights established in 1865 that ultimately became a landmark "Constitutional Takings" case that went before the U.S. Court of Federal Claims. The USCFC award of $4.4 million was appealed to the Federal Court of Appeals for Washington, D.C. where the award was overturned in 2012. While awaiting a decision, the US Forest Service and BLM in 2007 filed suit in Nevada Federal District Court against the estate of Wayne Hage alleging trespass on federal lands. In what could only be called a contentious proceeding, Nevada Federal Judge Robert C. Jones heard testimony from Humbolt-Toiabe Forest Ranger Steve Williams stating that:

> "*despite the right (of the Hages) to use the water, there was no right to access it, so someone with water rights but no permit from the US Forest Service would have to <u>lower a cow out of the air to use the water</u>, for example, if there were no* (agency granted) *permit to access it."*

Both the Appeals Court and the Nevada District Court were in agreement that there is "a right of access**"** to put livestock water to beneficial use on federal lands. Judge Jones ruling even included an access corridor with grazing rights while beneficially using the state's waters.

Fencing Cattle Off Their Privately Held Water

In drought stricken Otero County New Mexico, the FS blocked rancher's cattle from accessing his long held private livestock water rights. The agency told the ranchers with thirsty cattle that they merely replaced old barbed wire fences with new, much stronger metal based fences to establish enclosures to protect a "vital wetland habitat."

Otero County Commissioners issued a "cease and desist" order in an attempt to allow the cattle access to the rancher's water and to protect the state's sovereign water rights. The elected county commissioners charged the Forest agents with an illegal action that could ultimately lead to animal cruelty. The county threatened the arrest of federal personnel who are keeping the ranchers from their privately held water rights. (See Exhibit 3)

Tombstone Scenario:

In Tombstone, Arizona, the FS overreach begins with the agency overfiling on the city's 25 developed springs and wells located in the Huachuca Mountains. For more than 130 years Tombstone piped its privately held water rights some 30 miles for use. Even after the Huachuca's were designated a federal wilderness area in 1984, Tombstone was allowed to

maintain its road and critical access to its springs providing Tombstone with water for culinary needs and maybe more important in this hot, arid place – fire protection and public safety.

Tombstone won the water ownership challenge, but found the agency combative and stonewalling following torrential rains in 2011. After notifying the Forest Service of their need to repair damage as in the past, they were denied access. They sought relief based on the state's

public health, safety and welfare obligations. When the city received authorization to do badly needed repairs they were forbidden from using the previously approved mechanized equipment. As city employees showed up with hand-tools and wheelbarrows – armed Forest agents would not allow the "mechanized" wheelbarrows onto the Forest administered lands! At last report, the FS allowed Tombstone access to only 3 of their 25 springs.

Utah Diligence Claims:

The aggressive posture of the Forest Service in collecting western water rights is highlighted in its filing of 16,000 diligence claims on livestock water rights scattered across the Utah landscape belonging to Utah sheep and cattle ranchers. This decades old strategy was defended by now retired Regional Forester Harv Forsgren who argued before Congress "these diligence claims are made on behalf of the United States, which was the owner of the land where livestock grazed prior to statehood and livestock watering took place which action established the federal government's claim to water rights."

A "Diligence Right" or "Diligence Claim" under Utah law is a claim to use the surface water where the use was initiated prior to 1903. In 1903, statutory administrative procedures were first enacted in Utah to appropriate water. Prior to 1903, the method for obtaining the right to use water was simply to put the water to beneficial use. To memorialize a diligence claim, the claimant has the burden of proof of the validity of beneficial use prior to 1903. The agency's argument continues to be that the livestock beneficially use the water in the name of the United States prior to Utah's statehood. These claims will ultimately require a determination to be made by the State Engineer under the guidance of the Utah Legislature.

Defacto Water Rights:

By shrinking livestock grazing AUMs and the systematic dismantling of livestock ranching across Utah and the western public lands states perpetuated by adverse FS and BLM actions, the United States gained "defacto" water rights.

Through a process that has seen the FS and BLM cut more than 3 million livestock grazing AUMs since 1949 and currently has suspended use of more than 550,000 more AUMs, the federal government has gained an untold amount of unused rancher's livestock water rights across the Utah landscape. These defacto water rights have been illegally absorbed by the United States through actions by the FS and BLM without due process or just compensation.

Legal and Procedural Bullying

As has been pointed out in case after case, including Nevada's Hage family, Idaho's Joyce family, Utah's Sorensen family, all recognize agencies and anti-grazing interests use the agency processes and legal system to gain advantage. The processes impose staggering financial

costs on these hard-working American families, but in addition, the long and often drawn out proceedings are draining emotionally.

We are witnessing what appears to be even more aggressive agency actions aimed at causing fear to impose a chilling effect on those who are in disagreement or dissent with the national government. The case of San Juan Utah County Commissioner Phil Lyman for instance. Lyman

and local residents grew tired of stalling on a RS 2477 road closure order by BLM in Recapture Canyon. A process that requires the BLM to make a closure determination within 18 months had lasted more than seven years. Frustrated, Lyman led a protest ride which resulted in legal charges. The government ignored the lesser trespass charge instead seeking to prosecute for criminal conspiracy. Lyman was found guilty. This outcome sends a chilling message to those of us in the west that the public lands are under the control of the national government and do not challenge us!

In Oregon, the Hammond family did what has been done for generations, using prescribed burns to enhance grazing for their cow-calf operation. A prescribed burn for pasture management and a back-burn intended to protect the family's winter pasture from potential lightening caused fire on adjacent federal lands crossed onto the BLM, occurred more than five years apart. The two fires accidently reached onto BLM land burning a total of 139 acres. Astonishingly, two family members were charged under the Anti-terrorism and Effective Death Penalty Act of 1996. The family members were convicted and are currently awaiting sentencing. As a side note, the BLM has for two years refused to renew the remaining family members grazing permits.

There are instances across Utah and the west where federal land management agencies have set prescribed burns that got away or imposed the "let it burn" philosophy with devastating effects. For instance, Utah's Seeley Fire in 2012 on the Manti-LaSal National Forest started from a lightning strike. Local's contacted the FS about putting the fire out but were told to "let it burn." After consuming nearly 50,000 acres including private lands, critical grazing, wildlife and watershed damage which will be felt for a generation or more, there was no opportunity for prosecution, even though the damage could have been minimized had the FS acted or allowed early action.

Conclusion

The Congress of the United States not only has the right, but has the obligation to determine the reach of federal regulatory agencies. The evidence points to the facts that the federal land management agencies are promulgating and implementing regulatory burdens on the grazing industry detrimental to the intent of Congress. They are creating potentially insurmountable challenges to the families involved in public lands livestock ranching as a viable and sustainable component of the future, culture and economy of the western public lands states.

Thank you.